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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 68

R. H. DAVIS, TRADING AS DAVIS MOTOR SALES,
Petitioner,

vs.

AETNA ACCEPTANCE COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR PETITIONER.

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AETNA ACCEPTANCE COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR PETITIONER.

I.

OPINION UNDER REVIEW.

The opinion of the Appellate Court of Illinois, First District, in this case, was filed on February 7, 1934, but has not been officially reported. The opinion is set out in the record (p. 30) on file in this Court.

II.

JURISDICTION.

The opinion of the Appellate Court of Illinois, First District, was entered of record on February 7, 1934. A petition for rehearing (R. 29) was filed by petitioner on February 17, 1934, within the ten days provided by Rule 13 of the said Court as set out in the appendix. The order of the said Appellate Court denying the petition for rehearing was entered on February 26, 1934 (R. 29), thereby making the judgment of the Court final on said date (*People* v. *Gilbert,* 281 Ill. 619). Petitioner filed his petition in the said Appellate Court for a Certificate of Importance and Appeal on March 7, 1934 (R. 29), within twenty days after the judgment of the Court became final, as provided by Rule 22 of the said Appellate Court, set out in the appendix.

The judgment (R. 28) rendered in the trial Court, and affirmed by the Appellate Court of Illinois, First District, was for the sum of $1,000. (R. 32.) Under Section 203 (2), Chapter 110 of Cahill's Revised Statutes of Illinois (1933), being Section 75 (2) of the Illinois Civil Practice Act, set out in the appendix, the judgment of the Appellate Court was final and not reviewable by any other court of the State of Illinois, unless the branch of the Appellate Court that heard the case, granted leave to appeal to the Supreme Court of Illinois on the grounds of importance. The said Appellate Court denied the petition for a certificate of importance and an appeal, thereby denying petitioner recourse to any tribunal of the State of Illinois. The Appellate Court of Illinois was the highest court of the State of Illinois in which a decision could be had.

The jurisdiction of the Supreme Court of the United

States to grant the writ of certiorari and to review the aforesaid judgment of the Appellate Court of Illinois, First District, is conferred by Section 237 (b) of the Judicial Code (United States Code, Title 28, Section 344 (b)), as amended by the Act of February 13, 1925. Said statute is set out in the appendix.

Minneapolis etc. Ry. Co. v. *Rock*, 279 U. S. 593.
Central New England Ry. Co. v. *Boston Co.* 279 U. S. 415.
Mellon v. *O'Neill*, 275 U. S. 212.
Western Union Tel. Co. v. *Priester*, 276 U. S. 252.
Gregory v. *McVeigh*, 90 U. S. 294.

III.

STATEMENT OF THE CASE.

This cause comes before this Court on a writ of certiorari to the Appellate Court of the State of Illinois, First District. (R. 34.)

The Aetna Acceptance Company, the respondent herein, filed its suit in the Circuit Court of Cook County, Illinois, a court of general jurisdiction, in replevin against R. H. Davis, trading as Davis Motor Sales, the petitioner herein (R. 1), on September 25, 1929 (R. 16), to recover possession of a certain Auburn automobile. The automobile not being recovered under the writ, the respondent on December 24, 1929 (R. 1), filed a count in trover in the action, under the Illinois practice, alleging, in addition to the usual fiction in trover, that the petitioner had wilfully, wrongfully, tortiously and maliciously converted the chattel in question. (R. 1.) The petitioner thereupon filed a plea of the general issue and later a special plea in which he averred that after the happening of the alleged grievances, he had been adjudicated a bankrupt by the District

Court of the United States for the Northern District of Illinois, Eastern Division, and that in said proceeding he had been discharged from all debts and claims provable against his estate, including the claim of respondent upon which the aforesaid suit was based. (R. 2.) The respondent joined issue on this special plea by filing a replication, in which it averred that the cause of action arose out of a wilful and malicious injury by the petitioner to the property of the respondent, and that the claim was created by the fraud, misappropriation, embezzlement or defalcation of the petitioner while acting in a fiduciary capacity. The replication further alleged that the respondent was seized of title to the automobile under certain documents creating a method of financing the sale of automobiles known as the "floor plan," whereby respondent financed automobiles sold by petitioner, and that the respondent had title thereto as security for the payment of the sum of $1,181.37 which respondent had advanced to petitioner for the purchase of said automobile, and which was the amount claimed by respondent in the suit (R. 2); that the petitioner held the automobile under an agreement to hold it as respondent's property and not to sell or dispose of it until respondent had been paid said amount; and that petitioner, without the knowledge and consent of respondent, sold and converted the automobile. (R. 3.)

Trial was had to the Court without the intervention of a jury. (R. 3.) The evidence showed that the petitioner, during the transactions alleged, operated a retail automobile sales business in the Village of Oak Park, Illinois (R. 6), and that the respondent, during said period, conducted an automobile finance business for the purpose of financing retail automobile dealers in the purchase of automobiles, and that the respondent for a considerable period of time had financed the purchase of automobiles for resale by the petitioner. (R. 8.)

The automobile sought to be replevined was purchased by the petitioner from a distributor and placed on petitioner's salesroom floor. (R. 6, 17.) In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.87, which was ninety per cent of the purchase price of the chattel. (R. 5.) To insure the repayment of this amount, petitioner gave respondent his note payable in thirty days, and a trust receipt reciting that petitioner had received the automobile, that he agreed to hold the property as the property of respondent for the purpose of storing the same, that he would not operate the automobile for demonstration or otherwise, and that he would return the property to respondent on demand. The trust receipt also recited that petitioner would not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the automobile except upon written order of respondent, and payment to respondent of the amount of respondent's advance. (R. 7.) The evidence further showed that petitioner also gave respondent a chattel mortgage, and a bill of sale covering the automobile, in which petitioner warranted title to be in himself. All of these documents were attached together and executed simultaneously. (R. 7.)

It was further shown that the petitioner had the automobile on his salesroom floor for thirty days, and being unable to dispose of it upon maturity of the above obligation, gave a new note, trust receipt, chattel mortgage and bill of sale to respondent identical with the previous documents, all of which were substituted for the instruments originally given. (R. 4.)

The evidence further showed that prior to the above transactions, the respondent had financed from twenty-eight to thirty-five wholesale automobile transactions for petitioner (R. 8); that in each of these instances the petitioner had been permitted to display the automobile on his salesroom floor, and that upon the petitioner making

a sale of an automobile, he would receive the purchase price from the customer and remit the amount of the loan to respondent. (R. 8.) In none of these transactions was a formal release of the automobile ever given to, or requested by, respondent in advance of the particular sale. (R. 8.) The evidence showed that petitioner sold the aforesaid automobile on August 3, 1929 (R. 8), and it was stipulated at the trial that the automobile had been sold in the regular course of petitioner's business, and that petitioner had not been guilty of any concealment in respect to this particular sale. (R. 4, 8.)

The evidence further showed that immediately following the above sale, the petitioner notified respondent thereof, as had been his practice, and that he requested it to send him a statement of the amount of credit then due him, in order that a settlement of the accounts between the parties could be effected (R. 8); that the respondent at the time of the sale owed petitioner the sum of $452.10 (R. 13), and the further sum of $768.40 (R. 11) on a judgment which petitioner had paid as guarantor on the account of respondent. (R. 9.) That upon receipt of notice of the sale, the respondent sent a collector to the petitioner who demanded payment of the note, and that other demands for payment were later made by respondent, but that no demand was ever made for the possession of the automobile, nor did respondent ever present a statement or credit due petitioner, and that the account was therefore never settled. (R. 8.)

The evidence further showed that on September 13, 1929, the petitioner filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, Eastern Division. (R. 11.) The evidence also showed that the respondent was duly scheduled, both as a secured and unsecured creditor therein, and that the respondent (R. 10), in addition to re-

ceiving the usual notice to scheduled creditors in bankruptcy, had actual notice of the proceeding, which it derived from conducting an unsuccessful defense to an application by the bankrupt for an order to restrain respondent from proceeding with the replevin suit; (R. 16) that petitioner was duly discharged in bankruptcy, on June 9, 1932 (R. 11), and that thereupon the respondent proceeded with this suit under the issues hereinbefore mentioned.

At the conclusion of the trial the Court assessed damages in favor of respondent in the sum of $1,000 and entered judgment on the findings. (R. 18.) The trial court also specially found, at the request of petitioner, that although the petitioner had been guilty of conversion of the property, that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile. (R. 18.) A writ of error was duly prosecuted in the Appellate Court of Illinois, First District, by the petitioner, to review this judgment, but the judgment of the trial court was affirmed.

IV.

SPECIFICATION OF ERRORS.

1. The Appellate Court of Illinois, First District, erred in affirming the judgment of the trial court.

2. The said Appellate Court erred in its judgment in denying to petitioner the rights, privileges and immunities extended to him under Section 17 of the Bankruptcy Act.

3. The said Appellate Court erred in its judgment in holding that the claim of respondent had not been discharged in petitioner's bankruptcy proceedings.

V.

SUMMARY OF ARGUMENT.

A. The claim of respondent was provable in the bankruptcy proceeding.

B. The claim of respondent was not exempt from discharge under any of the Exceptions enumerated in Section 17 of the Bankruptcy Act.

(a) Exception (2).

1. The judgment was for a technical conversion.

(b) Exception (3).

(c) Exception (4).

VI.

ARGUMENT.

A. The claim of respondent was provable in the bankruptcy proceeding.

1. The claim of respondent was provable under either sub-Sections (1) or (4) of Section 63 of the Bankruptcy Act (United States Code, Title 11, Section (103a)), which provides in part as follows:

> "Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not. * * *
>
> (4) founded upon an open account, or upon a contract express or implied; * * *."

The evidence showed that respondent's claim was evidenced by a promissory note dated July 10, 1929, payable in thirty days from date (R. 4), secured by a lien upon the automobile. (R. 7.) The claim was therefore provable in bankruptcy under sub-Section (1) of the above statute.

In re Worcester County (C. C. A. 1), 102 Fed. 808.

In re Kyte (D. C. Pa.), 164 Fed. 302.

The claim was also provable under sub-Section (4) as a claim founded upon an implied contract. The election of respondent to sue petitioner in tort instead of in contract did not change the character of the claim so as to make it not provable in bankruptcy. Volume 2, Section 767, *Remington on Bankruptcy* (Fourth Edition), where the author states:

> "However, in cases where the tort may be waived and suit brought in contract, the claim may be proved in bankruptcy; * * *."

To the same effect is *Crawford* v. *Burke,* 195 U. S. 176, 193, where it was said:

> "We are, therefore, of opinion that if a debt originates or is 'founded upon an open account, or upon a contract, express or implied,' it is provable against the bankrupt's estate, though the creditor may elect to bring his action in trover, as for a fraudulent conversion, instead of an assumpsit, for a balance due upon an open account."

See also:

Tindle v. *Birkett,* 205 U. S. 183.
Clarke v. *Rodgers* (C. C. A. 1), 183 Fed. 518.
Shall v. *Camors,* 251 U. S. 239.
City of Elgin v. *Joslin,* 136 Ill. 525.
Toledo, Wabash & Western Ry. Co. v. *Chew,* 67 Ill. 378.
De Clercq v. *Mungin,* 46 Ill. 112.
Cushing v. *Hayes,* 46 Ill. 145.

B. The claim of respondent was not exempt from discharge under any of the exceptions enumerated in Section 17 of the Bankruptcy Act.

That part of Section 17 of the Bankruptcy Act here under discussion (United States Code, Title 11, Section 35), provides as follows:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the procedings in bankruptcy; or (4) were created by his fraud, embezzlemen, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity;"

From the language of the above statute it clearly ap-

pears that a bankrupt is discharged from all *provable* debts except those enumerated within the exceptions, and we have shown the claim to have been provable. We shall now show that the claim was not embraced in any of the exceptions of Section 17 of the Bankruptcy Act.

As hereinabove stated, the petitioner in his special plea averred that he had, after the happening of the alleged grievances, been adjudicated a bankrupt by the District Court of the United States for the Northern District of Illinois, Eastern Division, and that he had been discharged from all debts and claims provable against his estate, including the claim of the respondent, upon which the suit was based. The respondent joined issue on this special plea by filing a replication in which it averred that the cause of action arose out of the wilful and malicious acts of the petitioner, and by his fraud, misappropriation, embezzlement or defalcation. The issue presented was whether the claim had been discharged under Section (2) or Section (4) of the above statute. The trial Court, after hearing the evidence, found petitioner guilty of conversion of the automobile, and specially found that petitioner had not been actuated by any wilful, malicious or criminal intent in selling the automobile. (R. 18.) However, the burden of proof was upon respondent to show his claim within one of the exceptions of Section 17 of the Bankruptcy Act, and the record shows that this burden was not sustained.

In re Levitan (D. C. N. J.), 224 Fed. 241.
In re Grout, 88 Vt. 318.
Sherwood v. *Mitchell,* 4 Denio (N. Y.) 435, 17 N. Y. Com. Law R. 629.

(a) Exception (2).

The claim was not exempt from the operation of the bankrupt's discharge because it was not a liability for obtaining property by false pretenses or false representa-

tions, or for wilful and malicious injuries to the person or property of another.

1. The judgment was for a technical conversion.

The trial Court, at petitioner's request, having made the special finding that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile (R. 18), the character of the conduct of the petitioner in selling the automobile was foreclosed from further inquiry. If a conversion at all, it was simply a technical conversion. The trial Court failed to give legal effect to its special finding, and the Appellate Court of Illinois, in affirming the judgment of the lower Court, likewise failed, in holding the claim had not been discharged, to give legal effect to that finding. The special finding of the trial court was binding upon the said Appellate Court (*Knight* v. *Seney,* 290 Ill. 11).

Since the trial court found the defendant guilty of a technical conversion, free from any element of wilful, malicious or criminal conduct on the part of the petitioner, the character of the respondent's claim reduces itself to a mere naked judgment for $1,000, and nothing more. That this judgment was rendered notwithstanding the special findings shows that the trial Court undoubtedly based the judgment upon the petitioner's failure to pay the promissory note in evidence, rather than upon any act or acts of conversion, of which the record is barren. A person, however, may be guilty of an innocent or unintentional conversion without the wilful or malicious element.

In *Crawford* v. *Burke,* 195 U. S. 176, this Court said:

> "In the case under consideration defendants purchased, under the instructions of the plaintiff, certain stocks, and opened an account with him, charging him with commission and interest, and crediting him with amounts received as margins. Subsequently, and

without the knowledge of the plaintiff, they sold these stocks, and thereby converted them to their own use. Without going into the details of the facts, it is evident that the plaintiff might have sued them in an action on contract, charging them with the money advanced and with the value of the stock; or in an action of trover, based upon their conversion. For reasons above given, we do not think that his election to sue in tort deprived his debt of its provable character, and that, as there is no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity, plaintiff's claim against them was discharged by the proceedings in bankruptcy."

Also in the case of *In re DeLauro* (D. C. Conn.), 1 Fed. Supp. 678, 679, the Court stated:

"And trover, the classic form of remedy for a wrongful conversion, may or may not include the element of willful and malicious wrongdoing. Thus, in the case of *McIntyre* v. *Kavanaugh*, 242 U. S. 138, 37 S. Ct. 38, 61 L. Ed. 205, it was held that the conversion there under consideration was in fact willful and malicious, and hence nondischargeable in bankruptcy. Yet conversion may occur without the presence of that element, and in such cases is a liability dischargeable in bankruptcy."

To the same effect is *Swift & Co.* v. *Bullard & Son* (D. C. Ga.), 3 F. (2d) 814, 816, where the language is:

"The circumstances here tend rather to show a loss of the proceeds by bad collections and an appropriation of any that were collected because of a mistaken belief as to the effect of the "no collateral' indorsement, which is far from willful and deliberate conversion. *Walker Bros.* v. *Capital City Grocery Co.*, 28 Ga. App. 531, 112 S. E. 157; *White* v. *Morris Fertilizer Co.*, 31 Ga. App. 710, 121 S. E. 704. 'Dischargeability will be decreed in all cases such as those of agents, brokers, factors, auctioneers, conditional vendess, and the like, where there is neither a technical trust in the inception of the contractual relation, nor moral turpitude in the breach of it.' Collier on Bankruptcy (13th Ed.) p. 609."

And in *Wood* v. *Fisk,* 215 N. Y. 233, the Court speaking through Judge Cardozo stated:

> "The plaintiff makes the additional point that, even though his claim was provable, it was excepted from the operation of the discharge. He argues that it was, within the meaning of section 17 of the Bankruptcy Act, a liability for 'willful and malicious injuries to the property of another.' We held in *Kavanaugh* v. *McIntyre,* 128 App. Div. 722, 112 N. Y. Supp. 987; Id., 210 N. Y. 175, 104 N. E. 135, and again in *Andrews* v. *Dresser,* 214 N. Y. 671, 108 N. E. 1088, that there may be acts of conversion so wanton as to be included in that exception. Those were cases where the charge of conversion was equivalent to a charge of larceny. We think the misuse of the plaintiff's securities is not to be classified as a willful and malicious injury within the meaning of that statute. *Johnson* v. *Bruckheimer,* 133 App. Div. 649, 118 N. Y. Supp. 189; *Allen* v. *Fromme,* 195 N. Y. 404, 407, 88 N. E. 645. The repledge, unlike a sale, left the general property in the plaintiff; it gave rise, until followed by bankruptcy, to nominal damages only; and, so far as there was any willful conversion, it was therefore partial and technical, rather than absolute and malicious."

Of like effect is *Walker Bros. Co.* v. *Capital City Grocery Co.,* 28 Ga. App. 531, where it was said:

> "It is contended by the defendant in error that the bankrupt's debt falls within the exception created by subdivision 2 of the act, to with, the willful and malicious injury to the property of another. This contention is without merit, since it appears from the petition for certiorari and the answer thereto that the plaintiff's claim was duly scheduled as a liability of the bankrupt, and that the money judgment obtained in the trover suit was taken pending the bankruptcy proceedings of which the plaintiff had notice, and also that the conversion of the property in question was merely technical, without actual fraud or malice."

Of like effect are:

In re Levitan (D. C. N. J.), 224 Fed. 241.

Ferdinand v. *Cooke,* (N. J. Supp.), 115 Atl. 439 (not officially reported).

State v. *Beck*, 175 Ind. 312.
Crosby v. *Miller Co.*, 25 R. I. 172.
Volume 7, Section 3552, *Remington on Bankruptcy* (Fourth Edition).
In re Northrup (D. C. N. Y.), 265 Fed. 420.
Andrews v. *Dresser*, 214 N. Y. 671.

The rule stated in the preceding cases applies *a fortiori* to the case at bar where the judgment for conversion was rendered against petitioner with a special finding that petitioner had not been actuated by any wilful, malicious or criminal intent in selling the property.

In re Dixon (D. C. N. Y.), 21 F. (2d) 565, 566 is a case in point. In that case a stay of execution was sought to prevent the enforcement of a judgment rendered in the state court. The suit had been brought against certain corporate directors under the plaintiff's allegation "for obtaining property by false pretences or false representations, or for wilful and malicious injuries to the person or property of another." Verdict for plaintiff. The jury specially found that "no fraud, embezzlement, misappropriation, or defalcation was committed." In granting the stay, and in holding the judgment dischargeable in bankruptcy, the Court stated that it was bound by the pleadings, findings and judgment of the state court, and that it could not inquire into the character of the evidence therein taken, in order to ascertain the nature of the judgment. The relevant quotations from the opinion are:

> "It is well settled that a judgment *ex delicto* is a fixed liability, and, if owing at time of filing petition in bankruptcy, a release may be had unless it constitutes a liability 'for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another.' To ascertain the character of the liability merged in the judgment, recourse must be had to the pleadings and findings of fact by the trial court. Plaintiffs

maintain that the liability arose out of willful and malicious injuries to the person and property of the bank in whose behalf the judgment was recovered."

* * * * * *

"But the findings of the jury and of the court, as to both bankrupts, were that 'no fraud, embezzlement, misappropriation, or defalcation was committed.' This court is bound by the pleadings, findings, and judgment as to the particular matters in litigation before the state court. *Harper* v. *Rankin* (C. C. A.) 141 F. 626. The record before me does not show recovery for fraud, false pretences, or false representations, and no act essentially an act involving willful and malicious injuries to the person or property of another is specified or apparent."

* * * * * *

"Counsel for plaintiffs argued that, to determine the character of the basis for the judgments, it is necessary to examine, not only the pleadings, findings, and judgments, but also the evidence to discover the asserted willful and malicious injury to the bank. But the court is not, in my opinion, required to draw inferences from the evidence."

Of like holding is *In re Burchfield* (D. C. N. Y.), 31 F. (2d) 118, 119. A motion was there made to stay execution on a judgment obtained in the state court where the defendant was charged with fraud and deceit. Verdict was for plaintiff. The jury specially found that the money had not been obtained through fraud. The Court, in granting the stay, held that the special finding was conclusive, and that therefore the claim had been discharged. The language is:

"The first question asked the jury to determine whether the bankrupt received from the plaintiff a certain sum of money; the second question asked the jury to determine whether the plaintiff was entitled to a judgment for that sum of money including interest; and the third question asked the jury specifically to say whether or not this money was obtained by the bankrupt by fraud and deceit. It seems to me that the verdict of the jury based upon the replies to these three questions submitted to them without objection,

> and consequently with the approval of counsel for both parties, definitely determines the character of the judgment returned. It is that the money was obtained by the bankrupt from the plaintiff without fraud and deceit, and therefore without willful and malicious injury to the plaintiff within the accepted definition of those words as set forth in *Tinker* v. *Colwell* and *McIntyre* v. *Kavanaugh, supra.*"

Further confirmation of the same rule is found in:

Flanders v. *Mullin,* 80 Vt. 124.

Peters v. *United States ex rel. Kelley* (C. C. A. 7), 177 Fed. 885.

In re Nordlight (D. C. N. Y.), 3 Fed. Supp. 486.

Chambers v. *Kirk,* 41 Okla. 696.

We have now shown by the overwhelming authorities, that a judgment based upon a technical conversion—and in this case the Court found that petitioner had not been actuated by any wilful, malicious or criminal intent in disposing of the automobile—is not embraced within Exception (2) of Section 17 of the Bankruptcy Act. The trial court, having made the finding that the petitioner was guilty of a technical conversion, and nothing more, the Appellate Court erred in not giving effect to that finding by holding the claim to have been discharged.

The Appellate Court of Illinois, First District, in its decision here under review, in citing and quoting from *Campau* v. *Bemis,* 35 Ill. App. 37 (R. 33), recognized the Illinois rule that a wrongful intent is not an essential element in a technical conversion. But it misconceived the legal effect of a technical, as compared with a wilful and malicious, conversion, in holding, on the authority of *Lester* v. *Southern Security Co.,* 168 Ga. 307, that the claim had not been discharged. (R. 33.)

The last mentioned case is a syllabus opinion which cites only *Citizens' Bank* v. *Mullis,* 161 Ga. 371, as its authority.

The case is clearly against the great weight of authority, as herein set out, and the few cases in the Georgia Courts, which lend support to it, are spurious and stand by themselves. However, in *Lester* v. *Southern Security Co.* 168 Ga. 307, the judgment creditor held title to the property; in the case at bar the respondent, as hereinafter appears, had only a lien upon the property which petitioner sold with consent implied from a course of dealing with respondent. (R. 8.) The petitioner does not admit he was guilty of conversion, whether technical or wilful and malicious, for conversion is an offense against title, and the respondent at no time was seized with title to the automobile.

In *Citizens' Bank* v. *Mullis,* upon the authority of which *Lester* v. *Southern Security Co.* is based, the majority opinion of the Court is stated in the syllabus, which opinion misconceives the case of *McIntyre* v. *Kavanaugh,* 242 U. S. 138, therein cited. *Citizens' Bank* v. *Mullis* contains a well-reasoned dissenting opinion, concerning which the author, in Volume 7, Section 3552, *Remington on Bankruptcy* (Fourth Edition), comments:

> "The dissenting opinion represents the better reasoning and the Court's decision is wrong."

No claim was made in the pleadings or at the trial that the claim was a liability for obtaining property by false pretences or false representations under the first part of Exception (2) of Section 17 of the Bankruptcy Act, and therefore the same need not be considered.

(b) Exception (3).

Nor was any claim made that the respondent had not been duly scheduled as a creditor in ample time for proof and allowance of its claim, nor that respondent did not have actual knowledge of the bankruptcy proceeding. The record shows that petitioner was adjudicated a bankrupt on

September 13, 1929, (R. 11) and that the respondent was duly scheduled as a creditor. (R. 10.) In addition, respondent had actual knowledge of the bankruptcy proceeding on December 27, 1929, when it appeared and filed an answer (R. 16) therein and made a futile attempt (R. 17) to prevent the issuance of an injunction to stay this suit in the trial court. The burden, however, was upon respondent to plead and prove lack of notice, which of course it could not do.

Bailey v. *Gleason*, 76 Vt. 115.

(c) Exception (4).

The claim was not exempt from the operation of the bankrupt's discharge because it was not a liability created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity.

We have already seen that the Court specially found that petitioner, in selling the automobile, had not been guilty of any wilful, malicious or criminal intent. (R. 18.) Therefore the petitioner could not have been guilty of actual fraud or intentional wrong. The word "fraud" as used in Exception (4) of section 17 of the Bankruptcy Act means actual fraud and intentional wrong. It does not embrace constructive fraud or fraud in law.

Neal v. *Clark*, 95 U. S. 704.
In re Blumenberg (D. C. Tenn.), 94 Fed. 476.
Western Union Coal & Storage Co. v. *Hurd* (D. C. Mo.), 116 Fed. 442.
Bracken v. *Milner* (C. C. Mo.), 104 Fed. 522.
Lund v. *Bull*, 76 N. H. 132.
Louisville etc. Railway Co. v. *Bryant*, 149 Ky. 359.

The language of Exception (4) "While acting in a fiduciary capacity" limit and qualify each of the words

"fraud," "embezzlement," "misappropriation" and "defalcation."

Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Bullis v. *O'Beirne*, 195 U. S. 606.
Bloomingdale v. *Dreher* (C. C. A. 3), 31 F. (2d) 93.
In re Ennis (D C. N. Y.), 171 Fed. 755.
Lund v. *Bull*, 76 N. H. 132.

The fraud, embezzlement or misappropriation, as well as the defalcation, must have been committed while acting as an officer or in a fiduciary capacity. The Exception refers only to a technical or express trust.

Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Hennequin v. *Clues*, 111 U. S. 676.
Fleitas v. *Richardson*, 147 U. S. 550.
Chapman v. *Forsythe*, 2 How. 202.
In re Camelo (D. C. N. Y.), 195 Fed. 632.
Bills v. *Schielp* (C. C. A. 2), 127 Fed. 103.
Barrett v. *Prince* (C. C. A. 7), 143 Fed. 302.
Keefauver v. *Hevenor*, 148 N. Y. Sup. 434.
Mulock v. *Byrnes*, 129 N. Y. 23.
Reeves v. *McCracken*, 69 N. J. Eq. 203.

"Fiduciary capacity" as used in Exception (4) implies a fiduciary relationship existing previously to, or independently of, the particular transaction out of which the debt arose. In the case at bar if such a relationship existed, it arose out of the same transaction.

Upshur v. *Briscoe*, 138 U. S. 365.
Bloomingdale v. *Dreher* (C. C. A. 3), 31 F. (2d) 93.
Cronan v. *Cotting*, 104 Mass. 245.
Bryant v. *Kinyon*, 127 Mass. 152.
American Agr. Chemical Co. v. *Berry*, 110 Me. 528.
Glasco v. *Cooper*, 17 Ga. App. 690.

Martin v. *Starrett*, 97 Neb. 653.
First National Bank of Enosburg Falls v. *Bamforth*, 90 Vt. 75.

As hereinbefore appears, the petitioner was engaged in the retail sale of automobiles in the Village of Oak Park, Illinois, (R. 6) and the respondent was engaged in the business of financing automobile dealers in the purchase of automobiles. (R. 4.) The automobile hereinbefore mentioned was purchased by the petitioner from a wholesale distributor and placed on petitioner's sales room floor. (R. 6.) In order to obtain this automobile, petitioner borrowed from respondent the sum of $1,181.89, being ninety per cent of the purchase price, which, together with the remaining ten per cent thereof, advanced by petitioner, was paid to the distributor. (R. 4.) To insure repayment of the amount loaned by respondent, petitioner gave respondent his promissory note payable in thirty days and a "trust receipt" acknowledging possession of the automobile, and reciting that petitioner held the automobile for respondent, and that petitioner would neither encumber nor dispose of it without respondent's consent. In addition to the foregoing documents, petitioner also gave respondent a chattel mortgage and bill of sale on the automobile. In the bill of sale petitioner warranted title to the automobile to be in himself. (R. 7.)

The petitioner, having the automobile on his salesroom floor for a period of thirty days, and being unable to dispose of it within that time, and his obligation to respondent having become due, on July 10, 1929, gave respondent a new promissory note payable in thirty days from date. He also gave respondent a new "trust receipt," and a new chattel mortgage and bill of sale on the automobile. (R. 4.) All these documents were executed as part of the same transaction and attached together. (R. 7.) The respondent, having advanced the greater part of the purchase price

of the automobile under this arrangement, simply acquired a lien upon the property for the purpose of securing payment of the note. The Court will examine the whole transaction to ascertain what was the actual intention of the parties, and applying that test, it is clear that the parties intended for petitioner to retain title and for respondent to have a lien upon the property to secure the payment of the loan. Title was acquired by petitioner direct from the wholesale distributor, and there never was any transfer of title to respondent. Nor will the law presume the passage of title for security purposes.

If title was not in petitioner, then petitioner could not have passed title to his purchaser, and the remedy of respondent would have been in replevin against that purchaser. By the respondent's acceptance of the chattel mortgage from the petitioner, it was estopped from disputing petitioner's title to the property.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228.

Trustees of Schools v. *Wilson*, 215 Ill. 352.

Jeffery v. *Robbins*, 167 Ill. 375.

The Illinois law is, that where a conditional sales vendor accepts a chattel mortgage on the same property as that covered by the conditional sales contract, the chattel mortgage extinguishes the conditional sales contract, and the vendee's title thereby becomes absolute, subject only to the chattel mortgage lien.

Maxcy-Barton Organ Co. v. *Glen Corp.*, 355 Ill. 228.

This is also the general rule.

Premier & Potter Printing Press Co. v. *Fuller* (C. C. A. 2), 294 Fed. 451.

Nordone v. *Austin Drainage Excavator Co.*, 185 N. Y. S. (App. Div.) 309.

Buckeye Cotton Oil Co. v. *Westerfield*, 186 Ark. 505.

The same rule obtains where the conditional sales contract and chattel mortgage are executed by the purchaser as part of the same transaction. The presumption is that both instruments were intended as a chattel mortgage.

International Harvester Co. v. *Threlkeld*, 226 Mo. App. 600.

Altman & Co. v. *Silha*, 85 Wis. 359.

In Illinois a bill of sale given as security for the payment of a debt does not pass title; the instrument is in effect a chattel mortgage; and the relationship of debtor and creditor is created.

Whittemore v. *Fisher*, 132 Ill. 243.

That the respondent regarded title as being vested in petitioner, subject only to its lien, is clearly shown by the respondent's course of action after petitioner sold the automobile. On pages 2 and 3 of its brief in opposition to the petition for writ of certiorari, filed in this Court, respondent states:

> "In disregard of the terms of the contract, * * * petitioner sold respondent's automobile, and *after a number of demands had been made upon him for payment*, which he did not comply with, the petitioner about a month after this sale, filed his voluntary petition in bankruptcy."

Nor was any demand for possession, a necessary element in a replevin suit, ever made. Respondent simply demanded payment of the note, and nothing more—the fulfillment of a contract engagement. Respondent's repeated demands for *payment* of the note show conclusively that it regarded its relationship with petitioner as that of debtor and creditor. "Payment" of an obligation presupposes such relationship. In *Bronson* v. *Rodes*, 74 U. S. 229, 250, this Court said:

> "Payment of money is delivery by the debtor to the creditor of the amount due."

See also:

Porter v. *Monarch*, 17 Idaho 364.

A case that is conclusive on the nature of the relationship created between the petitioner and respondent under the so-called "trust receipt" is *Bloomingdale* v. *Dreher* (C. C. A. 3), 31 F. (2d) 93, 94. There the defendant had been confined to jail for his failure to pay a judgment rendered against him in the state court. The defendant sued out a writ of habeas corpus setting up that the judgment had been discharged in bankruptcy. There were no special findings of fact, but the evidence in the state court proceeding showed that the defendant, an automobile dealer, obtained financial assistance from the plaintiffs, who were engaged in financing the purchase and sale of automobiles, as was the respondent in the case at bar. Under their arrangement, the automobiles were bought for the defendant by the plaintiffs, who paid eighty per cent of the purchase price of each automobile, the defendant paying the remainder. The automobiles would then be delivered to the defendant at his place of business. The defendant, in respect to each automobile, simultaneous with its purchase, gave the plaintiffs a promissory note for the amount advanced by them on account of the purchase price, an assignment of all his right, title and interest in the automobile, and a "trust receipt" setting forth the terms and conditions under which the automobile was possessed by him, as in the case under consideration. The note contained a provision that upon its payment, the corresponding "trust receipt" and the automobile to which that "trust receipt" pertained, were "to be released" to the defendant. The "trust receipt" signed by the defendant, recited that the automobile was the property of the plaintiffs, and was received from them "upon the trust" therein mentioned. The defendant also "agreed" to hold the automobile "in trust" for the plaintiffs, at defendant's place of business, as the plaintiffs' property, with the privilege of selling it only upon the terms approved by the plaintiffs in writing, and in case of sale

to turn the proceeds over to plaintiffs. Defendant further agreed not to remove the automobile from his premises without plaintiffs' consent in writing, and to return the automobile unused and in good condition to plaintiffs upon demand. Upon default in the payment of the note, plaintiffs were at liberty to sell the automobile and apply the proceeds to the note, the defendant agreeing to pay any deficiency. It was also agreed that the making of the note should not divest the payee of title to the automobile or otherwise affect the "trust receipt," and that in case of non-payment of any note, all obligations owing by the defendant to the plaintiffs would become due. Certain of the automobiles thus financed were sold by the defendant without the written consent or knowledge of the plaintiffs, and the proceeds therefrom were not turned over to plaintiffs. Thereafter suit was brought in the state court where a judgment was obtained for the balance due plaintiffs. The defendant was thereupon taken into custody under a writ of *capias ad satisfaciendum.*

It will thus be seen that the facts in this case, in respect to the nature of the transactions, were similar in all respects to the facts in the case at bar. The United States District Court, for the District of New Jersey, granted a writ of habeas corpus on the principle that the judgment was not within Exception (4) of Section 17 of the Bankruptcy Act, and therefore had been discharged in defendant's bankruptcy proceeding.

The plaintiffs thereupon appealed to the Circuit Court of Appeals for the Third Circuit, and that Court, in affirming the decision of the District Court, said:

> "Whether Dreher's (defendant's) debt is one from which his discharge in bankruptcy would or would not be a release is to be determined from the facts when tested by section 17a of the Bankruptcy Act, 11 U. S. C. A. § 35, which, so far as here asserted to be applicable, reads thus: 'A discharge in bankruptcy shall

release a bankrupt from all of his provable debts, except such as * * *. (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting * * * in any fiduciary capacity.' By the decisions of the Supreme Court in *Crawford* v. *Burke*, 195 U. S. 176, 25 S. Ct. 9, 49 L. Ed. 147, and *Tindle* v. *Birkett*, 205 U. S. 183, 27 S. Ct. 493, 51 L. Ed. 762, it is now definitely settled that the words 'while acting in any fiduciary capacity' limit and qualify each of the words 'fraud,' 'embezzlement,' and 'misappropriation,' as well as the word 'defalcation' It thus becomes clear, we think, that section 17a(4) applies only to debts created by a person who was already a fiduciary when the debt was created. *Upshur* v. *Briscoe*, 138 U. S. 365, 378, 11 S. Ct. 313, 34 L. Ed. 931; *Cronan* v. *Cotting*, 104 Mass, 245, 6 Am. Rep. 232; *Fleitas* v. *Richardson* (No. 2) 147 U. S. 550, 556, 13 S. Ct. 495, 37 L. Ed. 276.

Viewing the facts as a whole, it is obvious that in the case at bar the transaction was one of borrowing and lending money, which created a debt, evidenced by a note, with respect to each car. That debt did not arise out of any fiduciary relations, howsoever comprehensively that term be construed. The borrower's assignment of his right, title, and interest in and to the car and his 'trust receipt' were but security for the debt evidenced by the note. Even if it be assumed that the breach by the borrower of the terms of the 'trust receipt' created an additional remedy for the collection by the lender of the debt due him, it did not create a new debt."

In support of the principle enunciated in the preceding case, see:

Fleitas v. *Richardson*, 147 U. S. 550.

Upshur v. *Briscoe*, 138 U. S. 365.

In re Butts (D. C. N. Y.), 120 Fed. 966.

American Agr. Chem. Co. v. *Berry*, 110 Me. 528.

Goodman v. *Herman*, 172 Mo. 344.

Conclusion.

We believe we have thus demonstrated that the judgment of the Appellate Court of Illinois, First District, was erroneous, and that the said court, by its judgment, denied to petitioner substantial rights, privileges and immunities, which have been extended to him under Section 17 of the Bankruptcy Act.

We therefore submit that the judgment of the said Appellate Court should be reversed.

Respectfully submitted,

Edward A. Zimmerman,
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Franklin D. Trueblood,
George A. Edwards,
Of Counsel.

APPENDIX.

Rules of the Appellate Court of Illinois, First District.

Rule 13.

PETITION FOR REHEARING.

Within ten days after a decision is entered of record the party desiring a rehearing shall give notice in writing to the opposite party or his attorney of his intention to make application therefor, and shall within said ten days file with the clerk of this court a party of such notice, with proof of due service thereof and seven printed copies of the petition for a rehearing. Cover color to be light green. Such petition shall state concisely the points supposed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the original abstract and brief relied upon. In no case will any argument be permitted in support of such petition. This rule will be strictly enforced, and any petition in violation thereof will be stricken from the files. If a rehearing be granted, the case will be reconsidered upon the record, abstracts, original briefs, petition and any answer thereto of which seven printed copies shall have been filed with the clerk of the court within ten days after the order granting a rehearing is entered of record.

Rule 22.

CERTIFICATE OF IMPORTANCE.

(1) When the Appellate Court has granted leave to appeal to the Supreme Court on the ground of importance, the clerk of the Appellate Court shall transmit to the clerk

of the Supreme Court the same record which was transmitted to the Appellate Court, with a certified copy of the record of the Appellate Court appended thereto, and the certificate of importance of the Appellate Court. Applications for leave to appeal on the ground of importance shall be made by printed or typewritten petitions clearly setting forth the grounds relied upon by the party asking the same, and must be presented to the court, if in session, or to a majority of the judges, if in vacation, within twenty days after entry of judgment in the Appellate Court. The Appellate Court may require bond as a condition of granting leave to appeal on the ground of importance.

STATUTES.

Section 203 (2) Chapter 10, Cahill's Revised Statutes of Illinois (1933), (Section 75 of the Illinois Civil Practice Act.)

> "(2) In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such case grant leave to appeal to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to grant leave to appeal for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal to the said Supreme Court: Provided, however, that in ac-

tions *ex contractu* (exclusive of actions involving a penalty) and in all cases sounding in damages the judgment, exclusive of costs, shall be more than fifteen hundred dollars ($1,500.00), or in cases in which the judgment is against the plaintiff and there is issued by the Appellate Court, or by one of the judges thereof in vacation, a certificate to the effect that there is fairly involved in the claim of the plaintiff more than fifteen hundred dollars ($1,500.00). *And provided also,* that application under this Act to the Supreme Court to cause it to grant leave to appeal for its review and determination shall be made on or before twenty (20) days before the first day of the succeeding term of said Supreme Court: *Provided,* fifty (50) days shall have intervened between the day on which a rehearing in the Appellate Court shall have been denied or the day on which the leave to apply for a rehearing shall have expired without any such application having been made, and the first day of such succeeding term of said court. But if less than fifty (50) days shall have intervened as aforesaid, then such application shall be made on or before twenty (20) days before the first day of the second term of the Supreme Court succeeding the day on which a rehearing in the Appellate Court shall have been denied or the day upon which the leave to apply for a rehearing shall have expired without any such application having been made, otherwise said power of the Supreme Court to review the judgment and decree of the Appellate Court shall cease to exist."

Section 237 (b) of the Judicial Code (United States Code, Title 28, Section 344 (b)):

("b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."